80395-1

NO. 57253-9-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF ARLINGTON, DWAYNE LANE, and SNOHOMISH COUNTY,

Appellants,

vs

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, STATE OF WASHINGTON; 1000 FRIENDS OF WASHINGTON nka FUTUREWISE; STILLAGUAMISH FLOOD CONTROL DISTRICT; PILCHUCK AUDUBON SOCIETY; THE DIRECTOR OF THE STATE OF WASHINGTON DEPARTMENT OF COMMUNITY, TRADE, AND ECONOMIC DEVELOPMENT; and AGRICULTURE FOR TOMORROW,

Respondents.

REPLY BRIEF OF APPELLANTS CITY OF ARLINGTON AND DWAYNE LANE

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A. INTRODUCTION

This case examines whether or not Snohomish County and the City of Arlington, two agencies required to plan under the Growth Management Act (GMA), may change the designation of land from agricultural to non-agricultural. If so, what standards must those agencies apply to their decision making and planning process to justify a change?

The next inquiry is examination of the appropriate standards to be applied by the Growth Management Hearings Board when reviewing the planning decision.

The change in designation followed an amendment to the area-wide plan for Snohomish County and added the newly designated property to Arlington's UGA. It is the City of Arlington and Lane's position that Snohomish County engaged in a proper review and determination under the GMA, was guided by the terms and conditions of the GMA, and appropriately changed the land designation of Island Crossing.[1]

The Hearings Board improperly adopted and applied standards of review that are not supported by the GMA. The Board also failed to grant proper deference to the planning of the local

[1] Only 75.5 acres of the area referred to as Island Crossing would be de-designated from agricultural.

agencies, failed to presume the validity of the planning of Snohomish County and Arlington, and improperly shifted the burden of proof to Snohomish County and Arlington to justify their planning decisions. As part of the justification to deny the local agency plan, the Board also improperly applied the concept of res judicata.

B. STATEMENT OF AUTHORITIES

1. Utilizing a kite on a string may be the only way to get GMA planning off the ground.

Respondents contend Island Crossing has no more connection to the city of Arlington than a "kite on a string." While intended to be a cynical criticism, the analogy actually serves to highlight exactly how planning under the GMA will look in the years to come. Gone are the days when a city could claim a need for room to grow and simply annex property to meet those needs. Often such annexation was accomplished by absorbing neat symmetrical chunks of land that were then filled in with development.

That is exactly the type of willy-nilly expansion the GMA was intended to prevent. Under the GMA, cities and counties are required to engage in an extensive analysis of GMA factors before

expansion will be allowed to occur. It is the application of the GMA-mandated factors that lead to "kite on a string" city outlines based upon the character of the land at issue. Rather than serve as grounds for derision of a city or county's planning efforts, the "kite on a string" actually serves as a symbol of agencies planning properly, and being guided by the mandates of the GMA. A look at various city boundaries throughout the state shows some extremely unique footprints.[2]

What the record in this case shows is that Island Crossing contains public facilities and is within Arlington's capital facilities area plan for water, utilities and sewage (CP 1823, CP 1835, CP 1840, CP 1854). The area undisputedly has water and sewer sufficient to serve three gas stations, three restaurants, a motel, an espresso stand and two single family homes. The water and sewer service runs underneath and adjacent to the land in question. The record indicates adequate capacity to handle further growth. Development in the area also includes services that are essentially unrelated to "freeway" services, such as a pharmacy, smoke shop, police station, community center, and a methadone treatment clinic

[2] Attached as Appendix A are copies of maps of the urban boundaries of the cities of Spokane and Blaine, Washington, submitted on the basis of judicial notice of public records.

operated by the Stillaguamish Tribe. (CP 426, CP 1855).

All parcels but one in the affected area are smaller than the minimum 20 acres for open space classification, and range in size from 20.7 acres to 2.9 acres (CP 1194), only 32% of the land is taxed as agricultural, and properties are currently assessed as being on "public water" and "freeway influence." (CP 1193-94, CP 1816, CP 1840, CP 1853-55).

Public services of fire protection, law enforcement, public health, education, recreation, environmental protection, and other governmental services are available in, and provided to the area by, Snohomish County Fire Protection District 19, the Snohomish County Sheriff, the Snohomish Health District, the Lakewood School District, and the Sno-Isle Regional Library System. (CP 1884).

Island Crossing is not in the middle of a vast expanse of agricultural land. The area is bordered on the west by Interstate 5 which has urban development westward of the freeway as well. The area abuts Arlington's UGA to the south. To the north are State Route 530 and the Stillaguamish River. Smokey Point Boulevard, commonly known as "Old Highway 99," forms the eastern boundary of the property. The land is less than a mile from Arlington's city

limits, and was originally included in Arlington's UGA. (CP 1193-94, CP 1822, CP 1855).

In light of these characteristics, services and facilities, which unquestionably describe Island Crossing, the question that must be asked is: If Island Crossing is not a proper area for expansion and growth under the GMA, what area ever will be considered appropriate? Where else is a city that needs space and is required to plan under the guides of the GMA going to go if it cannot look to land which has virtually every appropriate indicator of urban expansion identified by the GMA? The purpose of the GMA is to *regulate* growth through planning: it is not to *stop* growth through planning. That is a concept this Board has acknowledged. *Pilchuck, et al. v. Snohomish County*, Central Puget Sound Growth Management Hearings Board No. 95-3-0047 (Final Decision and Order, December 6, 1995).

This case exemplifies how implementation of GMA standards using the type of analysis the Board used here leads to a centralized planning authority which believes it is free to disregard critical analysis done by local planning agencies working to meet the local needs of the communities they serve. Usurpation of local control by a central authority is not what the Legislature envisioned

when it enacted the GMA; nor is it what the Courts have indicated is the proper course of planning under the GMA.

2. The Growth Management Hearings Board engaged in improper analysis and committed error in making its decision.

a. The Board improperly shifted the burden to Snohomish County and Arlington to justify their planning decision.

The presumption of validity required under the GMA does not require that a Board presume a clearly improper plan under the GMA must be upheld as valid: however, it does require that the Board presume the plan brought to it by a planning agency is valid and cannot, by any means, shift the burdens of the parties in the process.

Here, the Board failed to grant proper deference to Snohomish County and Arlington, and failed to presume the validity of their planning choices. This resulted in a fatal error of law that shifted the burden onto Snohomish County and Arlington to justify and prove the fact their planning complied with the GMA. This was not merely a procedural error. It was a substantive error which violates the fundamental purpose and guides of the GMA and was fatal to the decision making process.

In *Redmond v. Central Puget Sound Growth Management*

Hearings Board, 116 Wn.App. 48, 65 P.3d 337, *rev. den.* 150 Wn.2d 1007, 77 P.3d 651 (2003) (*Redmond II*), the Court of Appeals clearly told *this hearings board* that it was improper to apply an analysis which shifted the burden of justification for a change in land designation onto the governmental planning agency. There, the Court found the Hearings Board created a standard regulating a change in land use designations which did not appear in the GMA,[3] and then required the planning agency to prove it had conformed to the newly created standard before a change in designation could occur. The court concluded the process constituted an improper burden shift and was evidence of a failure to give proper deference to the planning agency's action. *Id.* at 55-56. That failure was fatal to the Hearing Board's decision and decision-making process.

> The Board's test for what it calls "de-designating" agricultural lands has no support in the GMA. Nothing in the GMA suggest a city must present "specific and rigorous" evidence subject to "heightened scrutiny" when defending a land use designation. Rather, the GMA requires the Board to presume a challenged ordinance is valid, and the challenger has the burden of establishing invalidity.

Id. at 56.

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[3] The Board required "demonstrable and conclusive evidence of changed circumstances to justify its de-designation", and concluded, "The City has failed to point to facts to justify removing these parcels from an agricultural designation." *Redmond II at 56.*

> The Board's analysis is contrary to the GMA. To the extent the Board required the City to establish the validity of the urban recreational designation, or subjected the City's decision to heightened scrutiny, the Board erred.

Id. at 58.

The action that was specifically rejected in *Redmond II* is precisely what occurred in the Board's analysis of Island Crossing. The Board improperly shifted the burden to Snohomish County and Arlington to justify their actions with regard to Island Crossing just as it did in *Redmond II*. The Board rejected the agency planning on the basis those challenging the change in designation made a *prima facie* case of showing there were no changes to the soils and there were *no other changed circumstances which would support the change of designation*. (FDO at 27, CP 2588) (emphasis added). The error of the Board's reasoning is that it allowed the challengers to the agency planning decision to show nothing, and called that a *prima facie case* proving their point and meeting their burden to show the planning decision did not comport with the guides of the GMA.[4]

[4] The actual standard to overturn an agency's planning decision, after presuming it is valid, is the "clearly erroneous" test, and a Board cannot substitute its judgment for the decision making body during this process. *Association of Rural Residents v. Kitsap Co.,* 141 Wn.2d 185, 196, 4 P.3d 115 (2000); RCW 36.70A.320(3). Instead, this Board failed to follow appropriate review standards

The Board then shifted the burden to the County and Arlington to show why the change in designation was proper.[5] This threshold error taints every subsequent decision and action by the Board. Just as the fruit of the poisonous tree doctrine invalidates subsequent criminal proceedings, the subsequent decisions of the Board here are improper.

The impropriety of the Board's burden shift cannot be explained away by blaming the action on imprecision of language regarding the terms validity and compliance.[6] The Courts have said exactly what they have meant to say following the direction of the GMA itself. Actions of a planning agency must be presumed valid. The Legislature went so far as to amend the GMA to insure Hearings Boards understood the importance of the concept. RCW 36.70A.3201. The Courts have then added the requirement that Boards *may not* shift the burdens under the act. There is no imprecision or confusion involved in the process.

A presumption of validity may not act as an automatic

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and applied this newly adopted, non-existent, non-standard, an act that was clearly erroneous.

[5] This is essentially a *de facto* application of the res judicata principle that cannot apply to this review of a legislative determination. Even CTED has difficulty explaining away the fact the prior decision of the board controlled this decision. See discussion, *infra* at Section 2(b)(i).

[6] CTED argument at p.23-24.

assumption of compliance under the GMA; however, it *does demand* that challenges to planning decisions and the planning choices themselves must be actively overturned on the basis of solid evidence which proves the planning decisions were *clearly erroneous*. The challenge cannot be based on a "prima facie" case showing nothing, or based on an improper burden shift, or an improper utilization of res judicata. Here, the Board failed to give proper deference to the actions of the agency and improperly shifted the burden onto Snohomish County and Arlington to justify their planning decision.

b. <u>The Hearings Board created and applied standards for change that do not appear in the GMA.</u>

In addition to improperly shifting the burden in this case, the Board created new standards to justify changes in land designation that do not appear, and have no support, in the GMA itself.

i. <u>Changed circumstances.</u>

There is nothing in the GMA that requires a showing of a significant change in circumstances when a land designation is changed under an area wide planning decision. Each area wide planning decision is a legislative act and under the GMA, must be presumed to be valid when adopted. In fact, the express need to

show a significant change in circumstances is exactly what this Court said was *not* required under the GMA.

> "De-designation" of agricultural lands is a serious matter with potentially very long term-consequences. *Such de-designation may only occur if the record shows demonstrable and conclusive evidence that the Act's definitions and criteria for designation are no longer met.* The documentation of changed conditions that prohibit the continued designation, conservation and protection of agricultural lands *would need to be specific and rigorous*. If such a de-designation action were challenged, it would be subject to *heightened scrutiny* by the Board.

Redmond II, supra at 55. (Emphasis in original, Court quoting the standards applied by the Hearings Board that were rejected as inappropriate).

The standard of changed circumstances is actually a back door utilization of res judicata by the Board. Petitioners will not reiterate the arguments that show res judicata cannot apply in this case, but will refer to Sections E (5) of the Arlington, Lane Opening Brief.[7]

CTED's analysis that the action of the Board did not amount to res judicata or improper reliance on an unreported decision is not

[7] The Stillaguamish Flood Control District mistakenly argues the arguments raised by Arlington and Lane in the Appeal Brief concerning the impropriety of res judicata were new issues on appeal. (Flood Control Brief at 24). That is patently incorrect. This issue has been argued and briefed in a timely and appropriate manner. Since Respondents did not raise it until the matter reached the trial court level, it was not appropriate to address prior to that time.

persuasive.[8] CTED argues that if there has been no significant change in circumstances since the prior court decision, there is no reason to find differently now.[9] That is a pretty good example of a working definition of res judicata. That is also not allowed under the GMA.

As *Redmond II* shows us, a new designation must be viewed without comparison to prior actions and must be examined on its own merits compared to the mandates and goals of the GMA, and not to any prior determinations. Denying a change in designation on the basis of a prior decision is improper res judicata applied to a legislative action.[10]

ii. Area-wide analysis.

The Board's requirement that an area-wide analysis of farming in the Stillaguamish Valley be done to justify changing the agricultural designation of the 75.5 acres was in error.

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[8] *See* CTED Brief at p.30, taking no position on the question of res judicata, but arguing the circumstances did not constitute res judicata.

[9] Arlington and Lane adamantly disagree with the premise there were no significant changes in circumstance between the prior de-designation and now and set those changes forth in their Opening Brief at 22.

[10] It must be remembered that even in the first court challenge, the Court of Appeals noted that there was evidence that would have supported a different conclusion, but the Court would not substitute its judgment for that of the Board. That conclusion was reached by the Court *before* additional changed circumstances that exist in this case. That is precisely why res judicata, as a working premise, whether called that or not, cannot play a part in the instant decision. *See* Arlington, Lane Opening Brief at 23.

In this instance, the Board rejected the County's analysis and justification to change the designation of Island Crossing because the County did not consider the:

> ". . . long-term agricultural significance of the larger pattern of agricultural land of which the Island Crossing triangle is a part, *i.e., the Stillaguamish River Valley."*

(Board Order Finding Continuing Noncompliance at p.16, emphasis added. CP 2901).

The Board found it was improper to focus on the specific 75.5 acre parcel of Island Crossing. The Board required:

> ". . . an objective, area-wide inquiry that examines locational factors...."

(Board Order Finding Continuing Noncompliance at p.17. CP 2902).

Further, the Board held:

> By de-designating resource lands based on *anecdotal testimony regarding specific parcels (the Island Crossing triangle viewed in isolation), as opposed to the contextual land use pattern of the agricultural lands and industry infrastructure that serves the surrounding Stillaguamish River Valley* (*see* Findings of Fact 16-18), the County has committed a clear error.
>
> (Board Order Finding Continuing Noncompliance at p.18, CP 2903, emphasis added).

The concept of "area-wide inquiry" as used by the Board in

the instant case goes far beyond any proper planning requirements of the GMA.[11] The "area" to be considered under the Board's ruling is "farming in the Stillaguamish Valley." That is an unacceptably large, and unworkable comparison. Under that regulation, no parcel would be subject to change because there is unquestionably farming in the Stillaguamish Valley. Under the Board standard, absolutely no land would be designated other than agricultural. Further, such an expansive comparison field would prevent any change in designation of land once the initial determination and designation had been made. Courts and the GMA clearly tell us that forever locking land into a particular designation is neither the goal of the GMA, nor appropriate as planning under the GMA. The proper analysis requires a parcel specific determination of land designation.

That parcel specific determinations of the agricultural nature of land is the proper approach is proven by the case law that has developed subsequent to *Redmond I. Redmond II* required specific

[11] CTED attempts to rescue the Board by citing to *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1092 (1998). (CTED Brief at 34). This citation is inapposite and does not save the error committed by the Board. The language in *Redmond I* regarding area-wide planning was essentially dicta. More importantly, cases decided subsequent to *Redmond I* have clearly focused on parcel specific analysis. This argument is more fully developed in Snohomish County's Reply Brief at pages 4-8, and Arlington and Lane adopt that argument and refer the Court to that analysis.

parcel analysis and rejected a requirement that change necessitated a showing of substantial change of circumstances by heightened scrutiny.

Appropriateness of parcel specific designations under the GMA has also been recognized by the Legislature. RCW 36.70A.1701 was specifically adopted to allow recreational uses on specific parcels of agricultural land. *C.f. Manke Lumber Co. v. Deihl*, 91 Wn.App. 793, 959 P.2d 1173 (1998), *rev. den.* 137 Wn.2d 1018, 984 P.2d 1033 (1999) (parcel specific large parcel analysis regarding forest land designation. *Manke* was decided prior to *Redmond I*, but review was denied after *Redmond I* was decided).[12]

Parcel specific analysis is consistent with the balance of the GMA. When making determinations of land designations, the GMA specifically requires an adjacency analysis that is parcel specific. RCW 36.70A.030(18); RCW 36.70A.110(1). The Board's Stillaguamish River Valley analysis is not proper under the GMA.

3. Expansion of the Arlington UGA to include Island Crossing meets the guides of the GMA.

a. The land capacity analysis identifying the need for more land for Arlington was upheld by the Hearings Board and no party appealed that finding.

[12] C.f. *Orton Farms v. Pierce County*, Central Puget Sound Growth Management Hearings Board No. 04-3-0007c (Final Decision and Order, August 2, 2004).

The Hearings Board concluded that the land capacity analysis done by Higa-Burkholder and Associates established the need for large parcel commercial land in Arlington. No parties appealed that part of the Board's decision, and thus, the conclusion that Arlington has shown a need for land is the law of this case. *See In re Marriage of Trichak*, 72 Wn.App. 21, 23, 863 P.2d 585 (1993) (failure to challenge decision through appeal makes that element of the decision become "law of the case"). CTED's attempt to now impugn the validity of the analysis is inapposite and must be ignored.[13]

CTED mistakenly posits the issue of the land capacity analysis may have been abandoned on appeal. To the extent that means there is no basis to dispute the validity of the fact the Board found the analysis cured any capacity defects, the statement is accurate because, as noted above, the capacity analysis found in favor of Arlington's need for large commercial parcels. That portion of the Board's decision was not appealed by anyone. As a result, CTED's argument in Section (D)(3) of its brief is not properly before this Court.

[13] CTED Response Brief at 45.

The finding of the Board that the large parcel analysis did not meet locational criteria of the GMA and was "self-imposed" was clearly appealed and argued by Petitioners. That issue is properly before this Court and was fully addressed in Arlington and Lane's Opening Brief at 41.[14]

b. Island Crossing meets the locational criteria of the GMA.

Throughout the course of this proceeding, no challenger to the de-designation has, or will ever be able to, show that the area in Island Crossing *DOES NOT* contain water and sewer, restaurants, a motel, residences, a pharmacy, a methadone treatment clinic. Nor will they ever successfully dispute that it is served by telecommunications and gas, has fire and police protection services in place, is served by the Lakewood School District and the regional library system, is landlocked and bound by Interstate 5, Highway 530 and Old Highway 99, and is adjacent to the City of Arlington's UGA. They cannot dispute these matters because they cannot be denied. It also cannot be denied that those are urban identifiers

[14]Arlington and Lane discuss the fact the land capacity analysis prepared by Higa Burkholder showed the need for additional commercial property in Arlington. Arlington and Lane Brief at 41. There was not further argument about the validity of the analysis proving the need for more land because the Board specifically recognized the analysis cured the GMA deficiencies. This finding was not appealed by any of the Respondents in this action and the impact of that finding is not at issue in this appeal.

under the GMA, and must be regarded as urban characteristics.

Urban growth should be *encouraged* in areas where adequate public facilities and services exist or can be provided in an efficient manner. RCW 36.70A.020(1). Public facilities include streets, road, highways and sidewalks, lighting systems, water systems, storm and sewer systems and schools. Public services include fire and police protection, education, health and education. RCW 36.70A.030(11) and (12); WAC 365-195-200(12) and (13). Yet, the Board concluded this 75.5-acre parcel failed to meet the locational criteria of the GMA.

This conclusion by the Board must be examined in light of the entire decision making process the Board used. When faced with the fact that sewer and water were undeniably present and in use at Island Crossing, the Board cited to one of its own decisions to hold that the presence of the services did not mandate inclusion within a UGA.[15] The Board completely missed the point of the presence of the services as far as the locational criteria is concerned. Their presence demands recognition of the area as having *urban characteristics*. The Supreme Court has held the existence of such services is evidence, as a matter of law, of the

[15] FDO p.29 at fn.9 (CP 2590)

urbanized nature of an area. *Thurston County v. Cooper Point Association*, 148 Wn.2d 1, 57 P.3d 1156 (2002). Instead of recognizing the precedent, the Board chose to follow its own decision, which allowed them to reach a contrary conclusion, a decision that predated that of the Supreme Court and was *eight years out of date.*[16]

The decision making process of the Board must be viewed in light of the fact the Board improperly shifted the burden of the parties, failed to grant proper deference to the planning actions of Snohomish County and Arlington, applied standards to justify a change in designation and analyses that do not exist in the GMA, ignored clear precedential guides, and improperly relied on prior unreported decisions to conclude that Island Crossing was not properly de-designated from agricultural and placed in Arlington's UGA.

After all is said and done, viewing the entire record, we must return to the question that was posed at the beginning: If Island Crossing is not an appropriate area for expansion and growth under the GMA, what area ever will be considered appropriate?

[16] Decision of Board dated July, 1994.

C. CONCLUSION

Based on the foregoing and the arguments presented in all Petitioners' briefing, the decision of the Growth Management Hearings Board should be reversed and Snohomish County Amended Ordinances No. 03-063 and 04-057 should be reinstated.

Respectfully submitted this 31st day of May, 2006.

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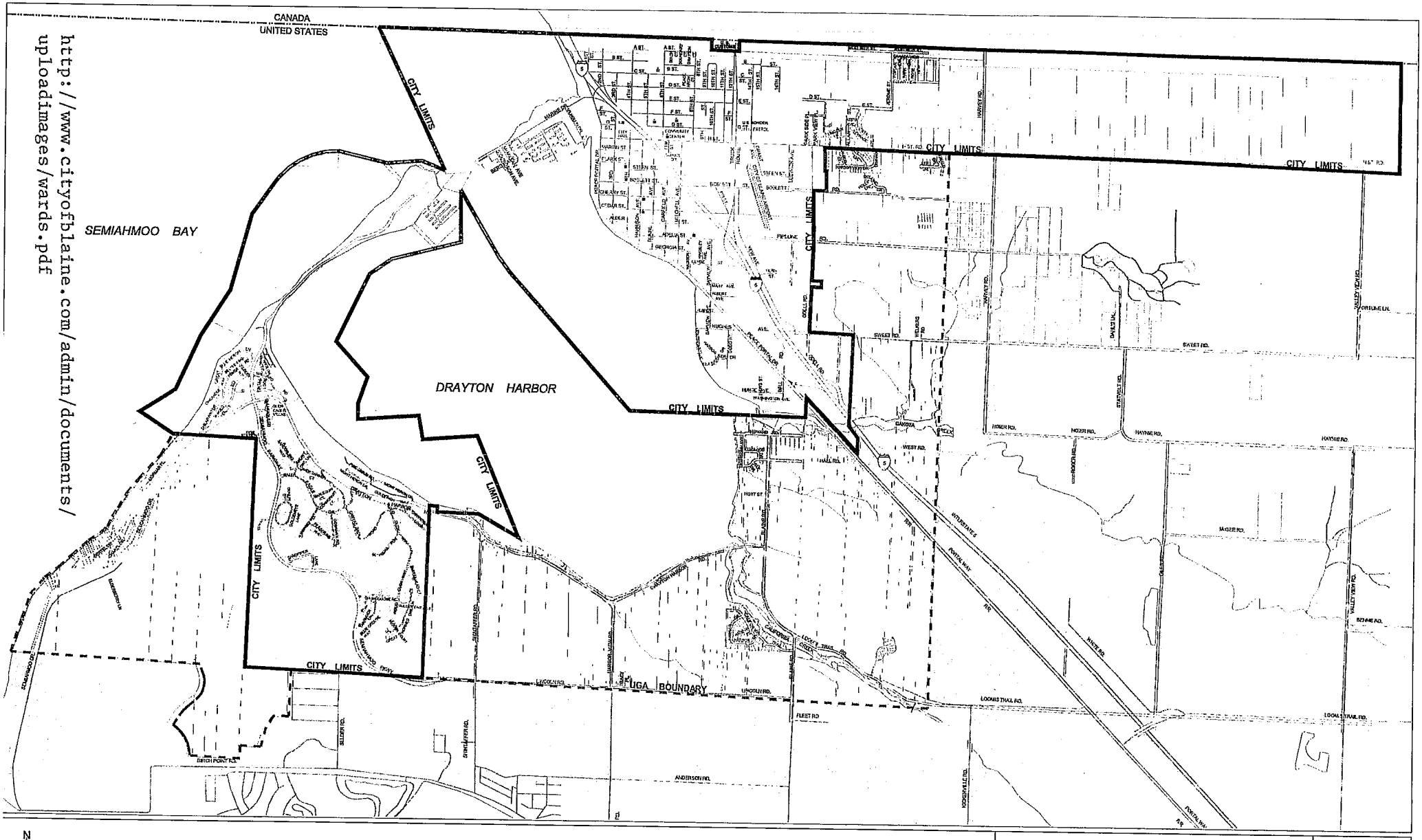
APPENDIX A

http://www.cityofblaine.com/admin/documents/uploadimages/wards.pdf



VOTING PRECINCTS
CITY OF BLAINE

1st Precinct
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CITY OF BLAINE

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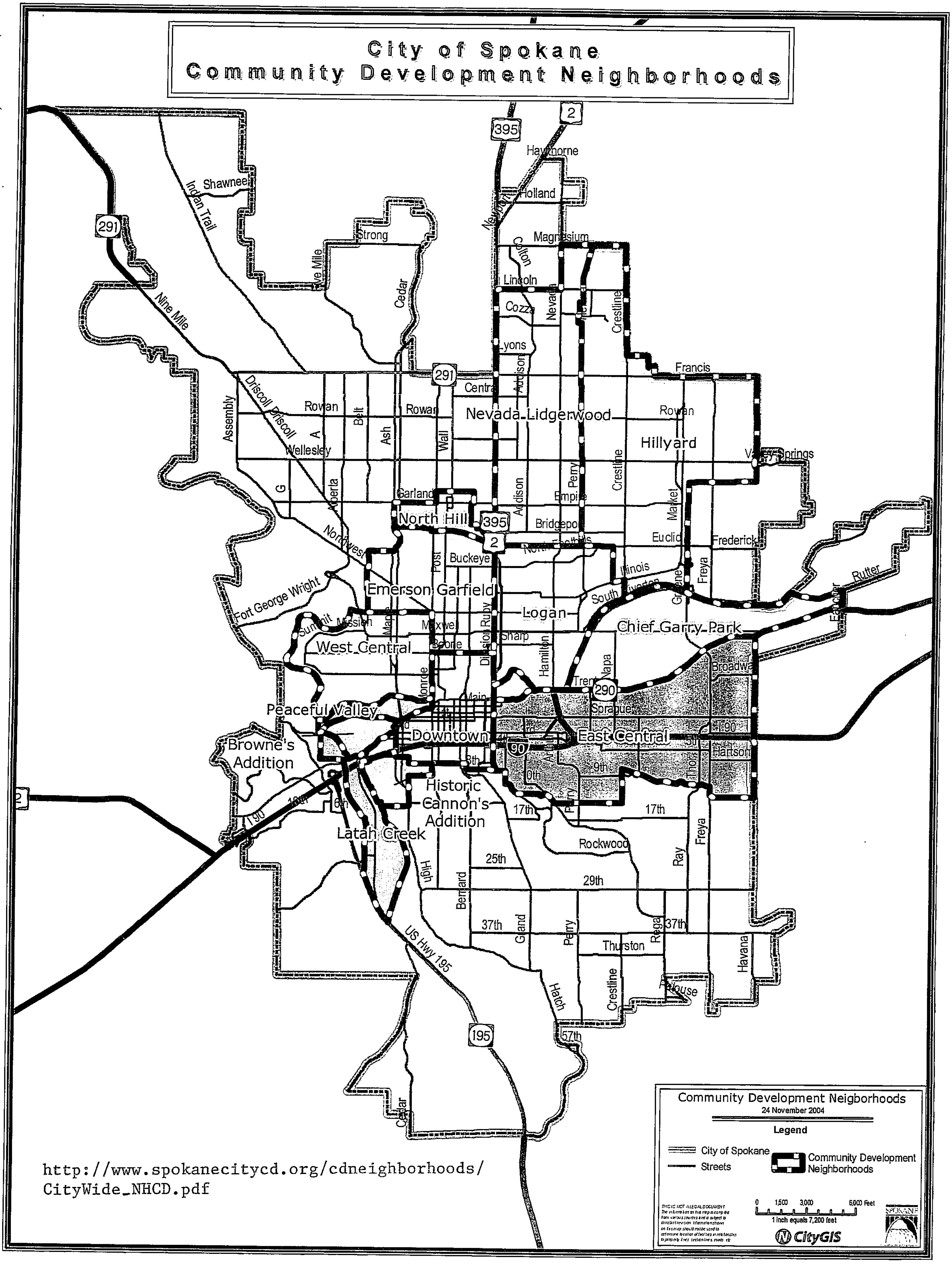

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COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

CITY OF ARLINGTON, et al, Appellants, vs. CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, STATE OF WASHINGTON, et al, Respondents.	NO.: 57253-9 CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the laws of the State of Washington that on the date given below I caused to be served in the manner indicated a copy of Reply Brief of Appellants City of Arlington and Dwayne Lane upon the following person(s):

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